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91-1946

Supreme Court, U.S.
FILED
JUN 1 1992
OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF OKLAHOMA ex rel.
DEPARTMENT OF HUMAN SERVICES

Petitioner,

v.

TRUST COMPANY OF OKLAHOMA, guardian
of the estate of Ellen Lee Barker,
a minor child,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a trust, created for the primary purpose of providing non-medical support but allowing for the payment of medical care if the beneficiary became ineligible for medical assistance, is an "available resource" under the Medicaid Act, 42 U.S.C. § 1396a (17)(B).

2. Whether the grantor of a trust may specifically exclude assets of a trust from consideration by a state as a "resource" under the Medicaid Act, 42 U.S.C. § 1396a (17)(B) and whether state law controls the definition of "resources" under the Medicaid Act.

3. Whether the application of the Oklahoma Supreme Court's state procedural waiver rule improperly precluded the application of federal law in considering the income from a state-created trust in the determination of Medicaid eligibility under 42 U.S.C. § 1396a (17)(B).

4. Whether an inter vivos trust agreement between a tortfeasor and the guardian of the estate of a minor child constitutes a "Medicaid Qualifying Trust" under the terms of Medicaid Act, 42 U.S.C. § 1396a(k).

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A. THE COURT BELOW HAS INTERPRETED A FEDERAL STATUTE OF CONSIDERABLE IMPORTANCE UNDER THE MEDICAID ACT AND ITS INTERPRETATION CONFLICTS WITH OTHER DECISIONS OF STATE COURTS OF LAST RESORT REGARDING THE SAME STATUTE.

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OPINIONS DELIVERED IN STATE COURTS BELOW

The opinion of the Oklahoma Supreme Court is reported in Trust Co. of Oklahoma v. State ex rel. DHS, 825 P.2d 1295 (Okla. 1991), and was filed on December 17, 1991. The opinion is contained in appendix 3.

GROUND UPON WHICH JURISDICTION IS INVOKED

The judgment of the Oklahoma Supreme Court was dated December 17, 1991. Timely rehearing was sought by the Oklahoma Department of Human Services (hereinafter referred to as "DHS") on January 27, 1992. Rehearing was denied on March 4, 1992.

The jurisdiction of this Court is predicated under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Const. Art. VI, Cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Medicaid Act and particularly 42 U.S.C. § 1396a (17)(B) as well as DHS's regulations regarding resources under the

Medicaid program has been reprinted in its entirety. See App. at 1 & 2 respectively.

STATEMENT OF THE CASE

In 1980, Ellen Barker, a minor child, was severely injured in an auto accident. While traveling in Arizona, the Barkers' car was struck by a school bus operated by the Ganado School District. She was rendered a quadriplegic as a result of the accident and filed suit against the Arizona school district. A settlement of $1,346,175.00 was made between the Barkers and the school district. After a deduction of costs from the settlement proceeds, Ellen Barker received $818,940.00.

At the time of settlement, the parents of Ellen Barker requested an Oklahoma Court to appoint the Trust Company of Oklahoma as

the guardian of the estate of Ellen Barker.[1] The Court granted this request and on May 22, 1981, the settlement proceeds were distributed and a trust agreement was executed. The trust agreement was executed between two private parties: the Ganado School District and the Trust Company of Oklahoma.

The "Declarations and Definitions" section of the trust agreement provided in pertinent part:

> A. Purposes:
>
> . . .
>
> Ellen has been hospitalized since the accident and will continue to be hospitalized or institutionalized in Oklahoma City for an indefinite period of time. Ellen's medical needs have been provided for by the Oklahoma Department of Human Services; however,

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[1] The parties to this litigation are those which appear in the style of the case; namely, the State of Oklahoma, Department of Human Services and the Trust Company of Oklahoma who is the guardian of Ellen Barker's estate.

> in addition to her medical needs, Ellen will need special care throughout her lifetime, in order for her to live as normal and productive a life as possible under these circumstances. The primary purpose of this trust, therefore, is to furnish Ellen, during her lifetime, with the nonmedical equipment, care, education, training, rehabilitation, entertainment, transportation, or assistance which she will need to assure her of as natural and pleasant a life as is possible in her condition. If, for any reason, Ellen ceases to qualify for medical assistance, then the trustee may in its discretion, also provide any medical assistance which Ellen may require.

In addition to the purpose of the trust, the trust agreement outlined the terms of payments of both the trust income and principal. The agreement provided in pertinent part:

> A. Income Payments. During the life of the primary beneficiary, trustee may pay the net income of the trust estate at such times, in such amounts, and in such manner as trustee deems best, in the absolute discretion of trustee, in accordance with the purposes set forth in Article I of this trust agreement, for the direct or indirect benefit of the primary

beneficiary, taking into consideration, however, all other sources of income available to the primary beneficiary.

. . .

B. Principal Payments. During the life of the primary beneficiary, trustee may pay the principal of the trust estate at such times, in such amounts, and in such manner as trustee deems best, in the absolute discretion of trustee, for the maintenance, support, health, and education of the primary beneficiary, taking into consideration, however, other resources available from third parties to provide for the maintenance, support, health, and education of the primary beneficiary.

After the trust was executed, Ellen Barker was hospitalized at the Oklahoma Children's Memorial Hospital from 1981 to 1986. During this time period, she remained eligible under the Title XIX program.

In late 1985, Ellen Barker's mother reported the trust to a county social worker of DHS in a re-application for medical assistance. During 1986, DHS discovered

that Ellen Barker had received $800.00 per month from the trust and $3,000.00 was paid to the Barker family from the trust for Ellen Barker's benefit. Based upon the receipt of these monies and the assets in the trust itself (which had grown from $818,000.00 to 1.2 million dollars) DHS terminated Ellen Barker's Medicaid case.[2]

After the termination of the Medicaid case, DHS continued to pay for some medical

---

2

It should be noted that a point of contention throughout the litigation was DHS's knowledge of the trust agreement and whether DHS was estopped to consider the assets of the trust. A DHS attorney was involved in the collection of monies from the estate based upon Medicaid's payment of medical bills prior to settlement. See 42 U.S.C. § 1396a (25). However, between 1981 and 1986, no documents regarding this trust could be found. At the state court level, the respondent continually argued the state was estopped to consider the assets of the trust based upon DHS's presence in the case at its outset. The petitioner argued that the DHS official was without any authority to agree to ignore the trust from consideration as a resource.

supplies under another federal-state program called the Crippled Children's Program (CCP). DHS followed this course while it discussed with the Trust Company how to resolve the matter. In May, 1987, DHS terminated all medical assistance under both Medicaid and CCP programs. At that time, both programs had the same qualifications.

In June, 1987, the Trust Company appealed the decision of DHS to terminate assistance under both programs to the DHS Administrative Appeals Committee. A hearing was held on September 10, 1987, and the Appeals Committee rendered a decision on February 12, 1988. The Appeals Committee affirmed the decision of DHS on the basis of the value of the trust exceeded the resource limitation under the Medicaid and CCP programs of $1,700.00.

The Trust Company appealed the final administrative decision of the agency in

March, 1988, to state district court. The state district court reversed the decision of DHS on October 5, 1989, finding DHS's decision was clearly erroneous because it was estopped from asserting that the trust is now an available resource. DHS then appealed this decision to the Oklahoma Supreme Court which assigned the case to the Oklahoma Court of Appeals, one of the state's civil appellate courts. At this stage in the proceeding, DHS raised the issue of whether a trust was a resource. See App. at 3. DHS also raised the issue of the Medicaid Qualifying Trust arguing that DHS was not estopped to consider the trust as a resource. See App. at 3. The Oklahoma Court of Appeals, Division III, reversed the decision of the state district court after finding that the doctrine of estoppel had no application where a state employee's acts were beyond the scope of employment.

After the Court of Appeals' decision, the Trust Company appealed this decision to the Oklahoma Supreme Court. The Oklahoma Supreme Court considered the case by certiorari.

On December 17, 1991, the Oklahoma Supreme Court decided the case. The Court found the state had waived any argument regarding consideration of income from the trust. See App. at 4. The basis for the waiver was the Court's procedural rule regarding certiorari. The Court also found that the majority of other jurisdictions had ruled that discretionary trust assets were not resources under the Medicaid Act. The Court found that because the grantor of the trust was the tortfeasor, and not the beneficiary, the trust was not a Medicaid Qualifying Trust under 42 U.S.C. §1396a(k). Finally, the Court found that "Because, absent a conflict with a principle of law,

interpretation of a trust's terms are controlled by the settlor's intent, we find the reasoning of the majority persuasive." Trust Co. of Oklahoma v. State ex rel. DHS, 825 P.2d 1295, 1303 (Okla. 1991). As stated by the Oklahoma Supreme Court, the reasoning of the majority of other jurisdictions was that the settlor's intent must be given affect. If the settlor intended to supplement rather than supplant public financial assistance then these assets were not resources under the Medicaid Act. Ibid.

DHS requested rehearing on January 27, 1992. At this stage of the proceeding, DHS raised the Supremacy Clause argument. See App. at 3. The reason this issue was not raised until rehearing is twofold. First, until the time the Oklahoma Supreme Court decided the case, the predominant issue was estoppel. Second, under Oklahoma Appellate Court rules, briefing is not permitted on

review by certiorari. 12 Okla.Stat. 1991, Ch. 15, App. 3, Rule 3.15. DHS was not aware on certiorari the Court would rely upon state law in the manner it did.

The Oklahoma Supreme Court denied rehearing on March 4, 1992.

REASONS FOR GRANTING THE WRIT

1. **THE STATE COURT BELOW HAS INTERPRETED A FEDERAL STATUTE OF CONSIDERABLE IMPORTANCE IN THE MEDICAID ACT. THE DECISION BELOW CONFLICTS WITH OTHER DECISIONS OF STATE COURTS OF LAST RESORT REGARDING THE SAME STATUTE, THE DECISION VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION AND THE DECISION ERRONEOUSLY EXPANDS THE MEDICAID ACT BY RELIANCE UPON STATE LAW.**

A. **THE COURT BELOW HAS INTERPRETED A FEDERAL STATUTE OF CONSIDERABLE IMPORTANCE UNDER THE MEDICAID ACT AND ITS INTERPRETATION CONFLICTS WITH OTHER DECISIONS OF STATE COURTS OF LAST RESORT REGARDING THE SAME STATUTE.**

The issue in this case is a simple one but it profoundly affects both state and federal governments in their implementation

of the Medicaid program. At the core of the Act is the responsibility of the single state agency to count "resources" and "income" of an applicant for assistance to determine their eligibility for services. The Medicaid Act provides in pertinent part, "A state plan for medical assistance must - . . . include reasonable standards for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter (B) provide for taking into account only such income and resources as are . . . available to the recipient . . . as would not be disregarded in determining his eligibility for such aid, assistance and benefits, (C) provide for the reasonable evaluation of any such income and resources, ...

The Oklahoma Supreme Court has decided that a 1.2 million dollar discretionary non-

medical trust is not a "resource" under the Medicaid Act. The basis of this decision was that under state trust law, a grantor may express his or her intent to shelter assets given to a beneficiary to exclude the assets as countable resources.

This issue has been debated in many state courts and courts of last resort throughout the nation have decided the issue in a conflicting manner. In the case of In the Matter of Welfare of K.S., 427 N.W.2d 653, 658-59 (Minn. 1988), the Supreme Court of Minnesota decided a state statutorily created trust for minors consisting of personal injury settlement funds was a resource under Minnesota's State Medicaid Plan.

Similarly, in the case of Arkansas Dep't. of Human Servs. v. Donis, 280 Ark. 169, 655 S.W.2d 452 (1983), the Supreme Court of Arkansas considered whether the

assets of a court created trust for a family as a result of a wrongful death suit was a resource under the Medicaid Act. The court found the trust assets were resources and reversed the decision of a lower court.

While basing its decision on a different ground, the Hawaii Supreme Court has also decided this issue contrary to the Oklahoma Supreme Court. In the case of Barham v. Rubin, 816 P.2d 965 (Hawaii 1992) the Hawaii court found that an incompetent's probate court trust created from a personal injury settlement was a Medicaid Qualifying Trust (MQT) under 42 U.S.C. § 1396a(k). The MQT statute requires that the grantor possibly be a beneficiary. Despite the fact that in Barham, supra, the probate court was the grantor, the court found the MQT recipient was the constructive grantor of personal injury settlement funds and the recipient was the beneficiary of the trust.

In direct contrast to these cases, and in agreement with the Oklahoma Supreme Court's decision, several courts have found that trusts are not resources under the Medicaid Act and given the same facts as this case were not Medicaid Qualifying Trusts. For example, in the case of Zeoli v. Commissioner of Social Servs., 179 Conn. 83, 425 A.2d 553, 556-59 (1979), the Supreme Court of Connecticut considered whether a testamentary spendthrift trust which was totally discretionary was an available resource under Medicaid. The court found the assets were not resources reasoning that under state trust law the testator wanted his assets to provide supplemental support only. Further, the court found the assets not available because the testator expressed this intent in his trust.

Similarly, in the case of Jansen v. Department of Pub. Welfare, 201 Neb. 185,

266 N.W.2d 742, 745 (1978), the Nebraska Supreme Court held that the assets of a discretionary trust were not resources in an application for Nebraska's aged, blind and disabled program.

In the case of Miller v. Ibarra, 746 F. Supp. 19, 26 (D. Colo. 1990), the federal district court for the District of Colorado held that inter vivos discretionary trusts were not resources and that these trusts were not Medicaid Qualifying Trusts because the grantor (the probate court) could not be the beneficiary. While this case was not a state court decision, it demonstrates the conflict with regard to decisions regarding MQT's.

There are a number of other appellate and trial court cases in other states which are also in conflict. Compare Commonwealth Bank & Trust v. Department of Pub. Welfare, 128 Pa. Commw. 528, 563 A.2d 1299 (1989);

Stoudt v. Commonwealth Dept. of Public Welfare, 76 Pa. Commw. 576, 464 A.2d 665-66 (1983); Harrington v. Blum, 458 N.Y. Supp. 2d 864, 117 Misc. 2d 623 (N.Y. App.Div. 1982) (all holding discretionary trusts are resources under Medicaid) with Lang v. Commonwealth, 515 Pa. 428, 528 A.2d 1335, 1345 (1987); Kline v. Utah Dept. of Health, 776 P.2d 57, 63 (Utah Ct. App. 1989); Lineback v. Stout, 79 N.C. App. 292, 339 S.E. 2d 103, 108 (Ct. App. N.C. 1986); Tidrow v. Director, 688 S.W. 2d 9, 13 (Mo. Ct. App. 1985) (all holding discretionary trusts are not resources under Medicaid).

Based upon the cases cited above, it is clear that states are divided on this issue.

The importance of this issue may not be as clear. Because the Medicaid program is a federal program administered in all 50 states, there should be a uniform rule regarding whether trust assets are

resources. As it stands now, courts are deciding cases on a case-by-case basis because there is no precise federal statutory or regulatory guidance. This case-by-case determination not only slows the eligibility process but the states also expend excessive litigation costs in having courts determine in each case whether a trust is a resource. While it is true that every trust instrument is factually dissimilar, the meaning of resource should not be dependent upon the intent of the grantor. It should be dependent upon what "resource" means under federal law.

B. THE DECISION VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

The purpose of the Supremacy Clause of the United States Constitution is to prevent conflicts which would follow if the federal government's general authority were subject

to local controls. United States v. Alleghany, 322 U.S. 174, 183, 64 S. Ct. 908, 913, 88 L.Ed. 1209 (1944). In some areas of law, including property law, states may regulate as long as there is no conflict with federal law. Cf. United States v. Burnison, 339 U.S. 87, 94, 70 S.Ct. 503, 507, 94 L.Ed. 675 (1950) with Kolourat v. Oregon, 366 U.S. 187, 196-197, 81 S.Ct. 922, 927-928, 6 L.Ed.2d 218 (1961).

In the case of Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979), this Court used the preemption doctrine to strike down a California family law provision, because it conflicted with a provision of the Railroad Retirement Act of 1974. While this Court recognized that the area of family law belonged to the state it stated:

> On the rare occasion when state family law has come into conflict with a federal statute, this

> Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be pre-empted. A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden.

Hisquierdo v. Hisquierdo, 439 U.S. 581, 99 S.Ct. at 808 (1979).

Using the test enunciated in the above referenced case, the Supremacy Clause is implicated in the present case. Because of the presence of this issue, the Court should accept this case.

In volumes of statutes, regulations and instructions by the Health Care Financing Administration, the Medicaid Act regulates how states implement a nationwide medical assistance program for the needy. This Court has acknowledged its broadness and its complexity, stating its Byzantine

construction makes the Act almost unintelligible to the uninitiated. Schweiker v. Gray Panthers, 453 U.S. 34, 43, 101 S. Ct. 2633, 2640, 69 L.Ed.2d 460 (1981). The complexity of the law demonstrates Congress's intent to fully regulate the program. Furthermore, Congress has explicitly mandated that states take into account available resources.

Against the backdrop of the Medicaid Act, there lies the area of property law and more specifically, the law of trusts. One of the predominate rules in the areas of trusts which is stated by many state court decisions labelling a trust as an "unavailable resource" is that the interpretation of a trust's terms are controlled by the settlor's intent. Trust Co. of Oklahoma v. State ex rel. DHS, 825 P.2d 1295, 1303 (Okla. 1991). See also Chenot v. Bordeleau, 561 A.2d 891, 894 (R.I.

1989); Lang v. Commonwealth, 515 Pa. 428, 528 A.2d 1335, 1345 (1987); Zeoli v. Commissioner of Social Servs., 179 Conn. 83, 425 A.2d 553, 556 (1979); Lineback v. Stout, 79 N.C. App. 292, 339 N.E. 2d 103, 108 (N.C. App.1986); Tidrow v. Director, 668 S.W. 2d 9, 12 (Mo.Ct.App.1985); Hoelzer v. Blum, 462 N.Y.S.2d 684, 689 (N.Y.App.Div.1983).

These two laws, the Medicaid Act's prescription to take into account "available resources" and the use of the settlor's intent to define access to the trust, conflict in this case. First, as a general rule of statutory construction, the words used by Congress must be presumed to have some meaning. See Pennsylvania Dep't of Pub. Welfare v. Davenport, ____ U.S. ____, 110 S.Ct. 2126, 2130, ____ L.Ed.2d ____ (1990). Then, despite the fact that there are no federal regulations in the Medicaid Act which tell states how to assess a trust

as a resource, it must be presumed that Congress intended some objective definition of "available resource." Without a definition, Congress would have simply told states they had discretion to define the term. With some definition intended by Congress, the Oklahoma Supreme Court has allowed one grantor of a trust to define the term "available resource." The Court below has made this ruling by stating that the grantor may intend to supplement his assets with public assistance and this intent, by itself, makes the assets unavailable. Petitioner respectfully submits that allowing grantors of trusts to decide what resources are available is contrary to any definition Congress may have meant when 42 U.S.C. § 1396(a)(17) was passed. It cannot be that one single person, a grantor, in each different trust can decide the

availability of assets in a trust thereby thwarting Congressional intent.

A second reason a conflict is created between the state law and the federal statute is Congress's pronouncement in the Medicaid Qualifying Trust provision found in 42 U.S.C. § 1396a(k). In passing this statute, Congress stated:

> The committee feels compelled to state the obvious. Medicaid is, and always has been, a program to provide basic health coverage to people who do not have sufficient income or resources to provide for themselves. When affluent individuals use Medicaid qualifying trusts and similar "techniques" to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children. This is unacceptable to the Committee.

House Committee's Report No. 265, 99th Cong. 1st Sess. at 72, 1986 amendment of 42 U.S.C. § 1396a(k).

It is clear from this excerpt that Congress's intent in passing this statute

was to prevent those having discretionary trusts to use them to shelter their monies to make them eligible for assistance.

Completing the Hisquierdo v. Hisquierdo, 439 U.S. 581, 99 S. Ct. 808 (1979) analysis, this conflict will do major damage to clear and substantial federal interests. The intent of the Medicaid program is to assist those who are financially needy. The result of allowing grantors of trusts, to determine whether trust assets are available as resources for public assistance will simply divert already scarce federal dollars away from those who are financially needy. While it cannot be stated that a large percentage of DHS's caseload is made up of individuals with trusts, it can be stated that since the decision below was pronounced several persons have designed non-medical trusts simply to become eligible for medical

assistance. In each case, the medical costs of the case are staggering, as they are in the case at bar.

In conclusion, the Supremacy Clause is implicated in this case because of the conflict between the decision of the Court below and the Medicaid Act and this Court should grant certiorari to consider the case.

C. THE DECISION ERRONEOUSLY EXPANDS THE MEDICAID ACT BY RELIANCE UPON STATE LAW

In the case of Schweiker v. Gray Panthers, 453 U.S. 34, 101 S. Ct. 2633, 69 L.Ed.2d 640 (1981), this Court interpreted the word available resources when construing whether the "deeming" of income between spouses was appropriate. While the issue in this case is not precisely similar, in Schweiker, supra, this Court took the opportunity to define "available" and stated that the word did not mean "in hand." This

Court took the opportunity to define "available" and stated that the word did not mean "in hand." This Court also stated that the State of Virginia was permitted to include resources over and above those actually paid. Schweiker v. Gray Panthers, 453 U.S. 48, 101 S. Ct. 2642, (1981). The significance of these statements is that the word available in 42 U.S.C. § 1396 a(17) does not mean actually paid or liquidated. This Court's holding conflicts with the decision below because the Oklahoma Supreme Court defined the word available to mean "in hand" or the amount of assets which could be converted to cash.[3]

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[3] The Schweiker, supra, holding also supports the proposition that Congress had some objective definition of available resource when it passed 42 U.S.C. § 1396a(17)(B).

CONCLUSION

This Court should grant certiorari in this case. The State Court below has interpreted a federal statute of considerable importance in the Medicaid Act. The decision below conflicts with other decisions of state courts of last resort regarding the same statute. The decision below also violates the Supremacy Clause and the decision erroneously expands the Medicaid Act by reliance upon state law.

Respectfully submitted,

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